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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., PETITIONER,

vs.

AMERICAN OIL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1964
CERTIORARI GRANTED MAY 18, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14183

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Honorable George N. Beamer, District Judge.

Joint Appendix—Filed July 16, 1963

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION
Hammond Civil 3090

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

vs.

AMERICAN OIL COMPANY, a Maryland corporation.

DOCKET ENTRIES

6- 2-61	Complaint filed. Summons issued and given to Marshal.
6-10-61	Summons returned served upon Amer. Oil Co. by serving J. E. Engle, Safety Director, 6-7-61. (3-40).

6-24-61 Defendant American Oil Co. files motion under Rule 12 of the Federal Rules of Civil Procedure, with brief and affidavit of service attached.

10-25-61 Pltf. Independent Petroleum Workers of America, Inc. file Motion for Summary Judgment Pursuant to Rule 56 together with Affidavit in Support thereof attached thereto.

9- 6-62 Order entered denying defendant's motion to make more definite and certain as to paragraphs 10 and 11 of complaint; granting defendant's motion to strike out the words "work" and [fol. 2] "working" in para. 4 of the complaint and granting motion to make more definite and certain as to para. 5 of complaint (SE) Beamer: J (copies to counsel).

10- 5-62 Amended complaint for violation of and to enforce a collective bargaining agreement. Request of the plaintiff for admission of facts filed.

10-11-62 Verified Answer of Defendant, American Oil Co. to Request of Plaintiff for Admissions of Fact under Rule 36 filed with Certificate of Service attached thereto.

11-13-62 Plaintiff files motion for summary judgment with brief in support of same. (Brief in file forwarded to Judge Beamer in So. Bend. 11-14-62).

1-11-63 Defendant, American Oil Co., files Answer to Amended Complaint with Certificate of Service attached thereto.

2-13-63 Defendant American Oil Company files Motion for Summary Judgment, with Affidavit attached thereto. Brief in support filed. Certificate of Service filed.

2-27-63 Reply Brief in Answer to Defendants Brief in Support of Motion for Summary Judgment filed. Affidavit in Response to Defendants Motion for Summary Judgment as to Legal Par. II filed.

3- 1-63 Parties present by counsel for hearing on cross-motions for summary judgment. Arguments heard as to Par. I of complaint. Arguments heard as to Par. II of complaint. Matter submitted and taken under advisement.

3-13-63 Order: The motion of the plaintiff for summary judgment as to Paragraph I of the amended complaint is granted. Defendant's motion for Summary Judgment as to Paragraph I of the [fol. 3] amended complaint is denied. Defendant's Motion For Summary Judgment as to Paragraph II of the Amended Complaint is denied. Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed (SE). Beamer: J (copies to counsel)/Memo attached thereto.

3-13-63 Judgment and Decree entered (SE). Beamer: J. This cause coming on to be heard on the respective Motions For Summary Judgment filed by the plaintiff and defendant and the court having heard the argument of counsel and being fully advised in the premises, the court having rendered an order and memorandum of decision, it is therefore Ordered, Adjudged and Decreed that there is no genuine issue as to any material fact herein and the prayer of the plaintiffs complaint is hereby granted; the defendant, American Oil Company, a Maryland corporation, is hereby ordered to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties attached to the complaint as Exhibit A, and judgment decree for costs is hereby rendered against the defendant. (SE). Beamer: J (copies to counsel).

4- 9-63 Defendant American Oil Company files notice of appeal. Clerks certificate of filing of notice filed. (copies to counsel).

4-10-63 Cash appeal bond deposited in registry of court, in sum of $250.00, by Tinkham, Beckman, Kelly.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

3090

AMENDED COMPLAINT FOR VIOLATION OF, AND TO ENFORCE A COLLECTIVE BARGAINING AGREEMENT—Filed October 5, 1962

Now Comes the plaintiff, by Green, Powers, Belshaw & Danko, its attorneys, and complaining of the defendant, alleges and says:

Legal Paragraph I.

1. That the plaintiff is a not-for-profit corporation organized under the laws of the State of Indiana, and is a labor organization representing employees in an industry affecting commerce as defined in the Labor-Management Relations Act, 1947, as amended, Chapter 120, Title III, Section 301, 61 Statutes 156, 29 U. S. C., Section 185, p. 140 et seq.;

2. That the defendant is a corporation duly organized under the laws of the State of Maryland, and is duly admitted to do business in the State of Indiana, and is an employer in an industry affecting commerce as so defined;

3. That on or about the 12th day of September, 1960, there was in full force and effect Section 301 (a) and (c) of Public Law No. 101, as amended by Public Law No. 189, and being Section 301 of the Labor Management Relations Act, 1947, as amended, and cited as aforesaid, and that this action arises thereunder, which section of which law more specifically provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, [fol. 5] may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties;

(c) For the purposes of actions and proceedings by or against labor organizations in the District Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

4. That at said time, there was in full force and effect between the plaintiff and the defendant's antecedent a certain agreement regarding hours, wages and other conditions of employment of certain employees of the defendant at its Whiting, Indiana, refinery, which agreement, in pertinent part, was set forth in Exhibit "A," heretofore appended to the complaint, and which exhibit is now made an exhibit to this amended complaint by reference;

5. That at said time, said agreement provided a grievance procedure for the determination of certain disputes which might arise between the parties, which grievance procedure culminated in compulsory arbitration, and that, in Article II, Section 10 (A) (1), the disputes referred to include grievances involving questions arising from alleged violations of the terms of said agreement;

6. That at said time, said agreement provided, in Article I, Section 1 thereof, that the defendant recognized the plaintiff as the sole and exclusive collective bargaining agent with respect to pay, wages, hours of employment, and other conditions of employment for certain employees at the said refinery, including employees whose rights were or might be affected by the grievance described in this complaint;

7. That on or about said date, the defendant assigned [fol. 6] certain crane operating work to persons not employed by it and not covered by said agreement, and did not cause such crane operating work to be performed by employees of the crane department;

8. That thereafter, in or about the 25th day of October, 1960, the plaintiff, by its institution of a grievance in ac-

cordance with the procedure outlined in said agreement, alleged that the defendant, by its assignment of such crane operating work, violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby, and thereafter the plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to the defendant for submission of the alleged violation to arbitration, in accordance with said procedure;

9. That thereafter, in or about the 9th day of February, 1961, the defendant refused to submit the said grievance to arbitration in accordance with the said procedure, as evidenced by Exhibit "B," heretofore appended to the complaint, and which exhibit is now made an exhibit to this amended complaint by reference, and the defendant continues to fail and continues to refuse to so submit said grievance.

Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement, and for its costs herein, and for all other and further relief in the premises.

[fol. 7] Legal Paragraph II.

1-4. The plaintiff here incorporates rhetorical paragraphs 1, 2, 3 and 4 of Legal Paragraph I as and for rhetorical paragraphs 1, 2, 3 and 4 of Legal Paragraph II, as though set forth in full herein;

5. That at said time, said agreement provided a grievance procedure for the determination of certain disputes which might arise between the parties, which grievance procedure culminated in compulsory arbitration, and that, in Article II, Section 10 (A)-(3), the disputes referred to included questions of alleged non-compliance with, modification of or discontinuance of any past policy, practice, custom or usage relative to working conditions;

6. That at said time, and at all times subsequent thereto, there was in existence at the said refinery, and in connection with the employees covered by said agreement, an established policy, practice, custom or usage relative to working conditions existing between the parties, whereby the defendant assigned all crane operating work to, and caused all such work to be performed by, employees of the crane department, provided that such employees were qualified by training to perform such work;

7. The plaintiff here incorporates rhetorical paragraph 7 of Legal Paragraph I as and for rhetorical paragraph 7 of Legal Paragraph II, as though set forth in full herein;

8. That thereafter, on or about the 25th day of October, 1960, the plaintiff, by its institution of a grievance in accordance with the procedure outlined in the said agreement, alleged that the defendant violated said established policy, practice, custom or usage relative to working conditions, which established policy, practice, custom or usage was a part of the said agreement, and that thereafter the plaintiff advanced the said grievance in accordance with [fol. 8] the procedure established by said agreement, including the making of a request to the defendant for submission of the question therein involved to arbitration, in accordance with said procedure;

9. The plaintiff here incorporates rhetorical paragraph 9 of Legal Paragraph I as and for rhetorical paragraph 9 of Legal Paragraph II, as though set forth in full herein.

Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement, and for its costs herein, and for all other and further relief in the premises.

Green, Powers, Belshaw & Danko, By William Belshaw, a member of the firm.

Green, Powers, Belshaw & Danko, 1430 119th Street, Whiting, Indiana, Telephone 659-0800.

[fol. 9]

STATEMENT WITH REFERENCE TO EXHIBIT "A" ATTACHED TO THE AMENDED COMPLAINT

Exhibit "A" attached to the complaint was the collective bargaining agreement between the plaintiff and the defendant. Only certain portions of this exhibit are pertinent to the appeal, which portions are "Article I, Recognition and Article II, Grievance Procedure." These articles read as follows (R. p. 5; pp. 1-9 of Exhibit):

Article I.

Recognition.

Section 1. The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company under the supervisory jurisdiction of the Manufacturing and Research Departments at its Whiting, Indiana, plant; except confidential employees, all employees represented by Research and Engineering Professional Employees Association and by Office Employees Association, and all guards, professional employees and supervisors as defined by the National Labor Relations Act, as amended.

Section 2. The terms "Employee" or "Employees" as used herein, mean any person or persons covered by this Agreement as stated in Section 1 above.

Section 3. The Company agrees that it will not discriminate in any manner against any employee because of membership in or activities on behalf of the Union. The Union agrees that there will be no solicitation of members or performance of other Union activities on the property of the Company during the working hours of any employee engaged therein or affected thereby except as otherwise herein provided.

Section 4. The Union agrees that there shall be no intimidation or coercion of employees by the Union or any of its members or representatives.

[fol. 10]

Article II.

Grievance Procedure.

"Section 1. Questions upon which employees covered by this Agreement desire consideration, may be first presented by the employees to their immediate supervisor. An employee having a grievance case may contact his supervisor, who will, if requested, call a Union representative for a conference with the Management.

"Section 2. If a Union representative has questions eligible to be processed through the procedure herein provided, upon which such Union representative wishes to negotiate, he shall attempt first to settle the question through negotiations with the immediate supervisor of the employees in question.

"Section 3. If a question is not settled between the Union and the immediate supervisor within two (2) workdays, or an extension of that time mutually agreed upon, after negotiations start between the Union representative and the immediate supervisor, the Union may appeal to the division head of the employees in question.

"Section 4. If questions are not settled between the Union representative and the Company representative during the first stage of negotiations, the issue shall be reduced to writing and signed by the party who presented the issue for consideration.

"Section 5. If the question is not settled within six (6) workdays, or an extension of that time mutually agreed upon, between the Union and the division head, or those designated by him, the question may be appealed in the manner designated below to the Plant Manager by the Union. The Union representatives and the Manager, or those designated by him, shall hold semi-monthly meetings on the second and fourth Mondays of each month whenever there are questions which have not been settled, and at such meetings the

Union may be represented by not more than seven (7) accredited representatives and the representatives of [fol. 11] the Company will not exceed seven (7) in number. Not less than three (3) workdays in advance of the meetings with the Manager, the Union shall advise the Manager in writing concerning such questions which are to be considered at the meeting. Likewise, the Manager shall advise the Secretary of the Union in writing concerning questions which the Management may desire considered at the meeting.

"Section 6. Special meetings of the Manager, or those designated by him, and the Union for the purpose of considering questions of great urgency will be held not later than three (3) workdays after receipt by either party of notice from the other party that a special meeting is desired. Such notice shall clearly set forth the subject to be considered.

"Section 7. Notwithstanding the procedure for handling questions as set forth above in this Article, if the Union desires to bargain concerning a matter which involves the interests of employees under the jurisdiction of more than one supervisor within a division, it shall first bargain concerning said matter with the division head, or those designated by him. Furthermore, if the Union desires to bargain concerning a matter affecting the interests of employees in more than one division, it shall first bargain concerning said matter with the Manager of the Refinery, or those designated by him.

"Section 8. Any counterproposals made by either party at the Manager's level of bargaining shall be made in writing if requested by the other party. A Memorandum of Agreement shall be prepared and signed by both parties to cover any question which has been agreed upon if such Memorandum of Agreement is requested by either party.

"Section 9. If the question is not settled as the result of negotiations between the Manager, or those designated by him, and the Union within a period of

fifteen (15) workdays, or within an extension of that time mutually agreed upon, the Company or the Union may refer the subject for arbitration provided written [fol. 12] notice of intention so to do has first been served by the Union on the Manager of the Whiting Refinery or by the Company on the Union at least five (5) workdays before such action is taken. If the party on whom such notice is served does not indicate a desire to negotiate further on the question, the subject will be eligible for referral to arbitration. Should notice of the desire to negotiate further be served then such negotiations shall be considered as starting as of the date of the service of such notice, and if agreement is not reached within fifteen (15) calendar days thereafter, or an extension of time mutually agreed upon, the subject will be eligible for referral to arbitration for settlement.

"An Arbitrator shall be selected from a panel of five (5) Arbitrators designated by the Federal Mediation and Conciliation Service for each arbitration session. The decision of the Arbitrator shall be final and binding on both the Company and the Union. Neither party shall disclose in any manner to any Arbitrator any information concerning previous offers of settlement made by the other party.

"The Union and the Company shall bear equally the expenses and fees of any Arbitrator selected.

"Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:

A. Questions which may be referred to arbitration shall be limited to:

1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, intepretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.

3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to [fol. 13] working conditions, and grievances arising from:

(a) the modification by the Company of any of said policies, practices, customs and usages, or

(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

B. The foregoing limitations on arbitration shall not be applicable to Section 11 of Article IV, of this Agreement nor to the second sentence of Section 6(b) of the Memorandum of Agreement dated May 24, 1952, covering the apprenticeship plan.

C. In accordance with the provisions of Article XII of this Agreement neither party shall have the right to have any issue pertaining to benefit plans arbitrated.

D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate.

"Section 11. No grievance shall be considered unless it is presented in accordance with the procedure outlined above within three (3) months from the date on which the grievance arose. Any proposal handled under this grievance procedure shall be considered a [fol. 14] closed issue if such proposal is not referred to the next higher step in the grievance procedure within three (3) months after the date on which the proposal was presented to any step in the grievance procedure. In the event either party desires additional time beyond the three (3) months period in which to negotiate on an issue at any step in the grievance procedure, such extension may be granted by mutual consent of the parties.

"Section 12. Union representatives will be paid their regular rate of pay for such time as they spend during their working hours while conferring with the Management.

"Section 13. The Company agrees that the Management shall give the Union written notification of the foreman or other Management representatives who are designated to adjust grievances.

"Section 14. The Company agrees to notify a Union representative within two (2) workdays following the discharge of any employee, who, at the time of such discharge, has to his credit more than sixty (60) work periods at the Whiting Refinery. The Union agrees that no issue will be made relative to such discharged employee, if an issue is not raised prior to the expiration of fourteen (14) calendar days following the discharge of such employee. If the Management's action of discharging such employee is reversed, and the employee is reinstated with no disciplinary action being taken in lieu thereof, then the employee will be paid in full by the Company for all wages lost as a result of the discharge.

"Section 15. Nothing in this Agreement shall be construed as restricting the rights of individual employees or groups of individual employees to adjust

grievances with the Company through the channels of the Company's administrative organization. The Company agrees, however, that after a grievance has been referred to a Union representative and such representative has dealt with the foreman or the Management representatives with respect thereto, the Company will not enter into negotiations with the employee [fol. 15] or employees who originally presented the grievance or with the employee or employees affected by the grievance unless a representative of the Union is given an opportunity to be present at, and have a voice in such negotiations.

"Section 16. Questions concerning any liability or obligation of the Company, which require the construction or interpretation of any statute or law, for example but not by way of limitation, Fair Labor Standards Act; Workmen's Compensation laws; National Labor Relations Act as amended; and Social Security laws, shall not be eligible for processing through the grievance procedure. The provision of this Section will in no way prejudice or affect those rights of the parties as set forth in Section 9 and 10 of Article II of this Agreement, which arise solely under and by virtue of and are based entirely on the terms of this Agreement."

STATEMENT WITH REFERENCE TO EXHIBIT "B" ATTACHED TO THE AMENDED COMPLAINT

(This Exhibit which is a letter from American Oil Company to the union dated February 9, 1961, appears on sidefolio 23, printed page 20 of the Joint Appendix.)

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

3090

REQUEST OF THE PLAINTIFF FOR ADMISSION OF FACTS—Filed October 15, 1962

To: Tinkham, Beckman, Kelly & Singleton
Attorneys at Law
708 Calumet Building
Hammond, Indiana

The plaintiff hereby requests the defendant's counsel, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within ten (10) days after service of this request, for the purposes of the above-entitled action only, the truth of the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of Legal Paragraph 1, of the amended complaint heretofore served in the above-entitled cause.

Green, Powers, Belshaw & Danko, By William Belshaw, A member of the firm.

Green, Powers, Belshaw & Danko, 1450—119th Street, Whiting, Indiana. Telephone: 659-0800.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT

3090

VERIFIED ANSWER OF DEFENDANT, AMERICAN OIL COMPANY, TO REQUEST OF PLAINTIFF FOR ADMISSIONS OF FACT UNDER RULE 36—Filed October 11, 1962

The defendant, American Oil Company, as and for its Answer to plaintiff's request to admit the truth of the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of Legal Paragraph 1, of the amended complaint herein alleges:

1. Defendant admits the allegations contained in rhetorical paragraph 1 of legal paragraph 1 of the amended complaint.

2. Defendant admits the allegations contained in rhetorical paragraph 2 of legal paragraph I of the amended complaint.

3. Defendant admits the allegations contained in rhetorical paragraph 3 of legal paragraph I of the amended complaint.

4. Defendant admits the allegations contained in rhetorical paragraph 4 of legal paragraph I of the amended complaint.

5. Answering the request for admission of the allegations contained in rhetorical paragraph 5 of legal paragraph I of the amended complaint, defendant admits that the agreement referred to therein by plaintiff contains a grievance procedure for the determination of certain disputes which grievance procedure culminates in arbitration; but defendant denies that the grievance procedure includes all grievances involving questions arising from alleged violations of the terms of said agreement.

6. Answering the request for admission of the allegations contained in rhetorical paragraph 6 of legal para- [fol. 18] graph I of the amended complaint, defendant admits that Article I, Section 1 of the agreement referred to in that paragraph provides that defendant recognizes the plaintiff as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for certain employees at the said refinery, but defendant denies that said clause includes any employees whose rights were or might be affected by the grievance described in the complaint and defendant denies that there were any employees whose rights were or might be affected by said grievance.

7. Defendant admits the allegations contained in rhetorical paragraph 7 of legal paragraph I of the amended complaint.

8. Answering the request for admission of the allegations contained in rhetorical paragraph 8 of legal paragraph I of the amended complaint, defendant admits that plaintiff instituted a grievance and admits that plaintiff made a request to the defendant for the submission of said

grievance to arbitration, but defendant denies that said grievance was one contemplated by the procedure outlined in said agreement.

9. Answering the request for admission of the allegations contained in rhetorical paragraph 9 of legal paragraph I of the amended complaint, defendant admits that defendant refused to submit the said grievance to arbitration, but defendant denies that the procedure referred to contemplated the submission of this particular grievance to arbitration.

J. C. Ducommun.

[fol. 19] *Duly sworn to by J. C. Ducommun, jurat omitted in printing.*

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

3090

MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56—Filed November 13, 1962

Now Comes the plaintiff, by its counsel of record, and by way of Motion for Summary Judgment, alleges:

1. That the pleadings, being Legal Paragraph I of the amended complaint heretofore served in this cause, together with the affidavit appended to this motion, show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as to said Legal Paragraph I as a matter of law;

2. That such judgment should be entered in favor of the plaintiff, together with costs.

Wherefore, the plaintiff prays for summary judgment and costs.

Green, Powers, Belshaw & Danko, By William Belshaw, Attorneys for Plaintiff.

Green, Powers, Belshaw & Danko, 1450—119th Street, Whiting, Indiana, Telephone: 659-0800.

[fol. 21]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF WILLIAM BELSHAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

State of Indiana,
County of Lake, ss.:

William Belshaw, being first duly sworn on oath, deposes and says:

1. That the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of the amended complaint heretofore served, being those rhetorical paragraphs in Legal Paragraph I of said amended complaint, are true, the contents of said aliegations being by reference made a part of this Affidavit;

2. That he has appended to this Affidavit, marked respectively, Exhibits B and C, which exhibits are by reference made a part of this Affidavit, photocopies of the grievance and refusal to arbitrate which were referred to in the said Legal Paragraph I of the said amended complaint;

3. That this Affidavit is made in support of the Motion for Summary Judgment filed herewith by the plaintiff, and for the purpose of inducing the Court to grant said Motion;

4. That this affiant is counsel for the plaintiff, has been so employed by it for a period in excess of fourteen (14) years, knows of his own knowledge that the facts alleged in the indicated rhetorical paragraphs of said Legal Paragraph I are true, assisted in the preparation of the collective bargaining agreement referred to herein, as-
[fol. 22] sisted in the preparation of the grievance statement referred to therein, and is sufficiently informed as to all other matters stated herein to make this Affidavit.

William Belshaw.

Subscribed and sworn to before me this 18th day of October, 1962.

Flora Libster,
Notary Public.

(Seal)

My commission expires: 11-21-62.

EXHIBIT B TO AFFIDAVIT OF WILLIAM BELSHAW

Independent Petroleum Workers of America, Inc.
Whiting, Indiana

Date 10-25-60

Proposal No. 60-105

The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost.

Date Rec'd R. W. Mecklin. 10-26-60, 10:45 a. m.

Date Denied 11-22-60

By R. W. Mecklin.

By J. J. Sotak,
(Representative)

Div. No. 10 Dept. Crane.

[fol. 23]

EXHIBIT C TO AFFIDAVIT OF WILLIAM BELSHAW

(Letterhead of American Oil Company).

February 9, 1961

Independent Petroleum Workers of America, Inc.
1923 Clarke Street
Whiting, Indiana

Gentlemen:

Your letter of February 2, 1961, included among those cases listed by you for appeal to arbitration the case designated as Whiting 60-105.

During our November 28, 1960 meeting with you, we indicated in our discussion of your proposal on this case that we questioned its arbitrability. This will confirm our position that questions arising from or related to the issue in Whiting 60-105 are not eligible for arbitration either as to the merits or as to the arbitrability. We believe that such questions can properly be resolved only through the negotiation process at a time when our working Agreement is open for such negotiations.

In view of our position, which we are willing to defend in a court of law if necessary, we do not intend to proceed with referral to arbitration for such ineligible questions.

Very truly yours,

A. F. Endres.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

3090

ANSWER OF DEFENDANT, AMERICAN OIL COMPANY, TO AMENDED COMPLAINT—Filed January 11, 1963

First Defense.

Comes now the defendant, American Oil Company, by its attorneys, and for its defense to Legal Paragraph I of the amended complaint herein, alleges and says:

1. Defendant admits the material allegations contained in rhetorical paragraph 1 of legal paragraph I of the amended complaint.

2. Defendant admits the material allegations contained in rhetorical paragraph 2 of legal paragraph I of the amended complaint.

3. Defendant admits the material allegations contained in rhetorical paragraph 3 of legal paragraph I of the amended complaint.

4. Defendant admits the material allegations contained in rhetorical paragraph 4 of legal paragraph I of the amended complaint.

5. Defendant denies each and all of the allegations contained in rhetorical paragraph 5 of legal paragraph I of the amended complaint.

6. Defendant denies each and all of the allegations contained in rhetorical paragraph 6 of legal paragraph I of the amended complaint.

7. Defendant admits the material allegations contained in rhetorical paragraph 7 of legal paragraph I of the amended complaint.

8. Defendant denies each and all of the allegations contained in rhetorical paragraph 8 of legal paragraph I of the amended complaint.

[fol. 25] 9. Answering rhetorical paragraph 9 of legal paragraph I of the amended complaint, defendant admits that it refused to submit the said grievance to arbitration and denies all of the other allegations contained in said rhetorical paragraph.

Wherefore, defendant prays judgment for its costs herein expended.

Second Defense.

Comes now the defendant, American Oil Company, by its attorneys, and for its defense to the allegations of Legal Paragraph II of the amended complaint herein, alleges and says:

1-4. For its answer to rhetorical paragraphs 1, 2, 3 and 4 of legal paragraph II of the amended complaint, defendant incorporates herein its answers to rhetorical paragraphs 1, 2, 3 and 4 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

5. Defendant denies each and all of the allegations contained in rhetorical paragraph 5 of legal paragraph II of the amended complaint.

6. Defendant denies each and all of the allegations contained in rhetorical paragraph 6 of legal paragraph II of the amended complaint.

7. For its answer to rhetorical paragraph 7 of legal paragraph II of the amended complaint, defendant incorporates herein its answer to rhetorical paragraph 7 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

8. Defendant denies each and all of the allegations contained in rhetorical paragraph 8 of legal paragraph II of the amended complaint.

9. For its answer to rhetorical paragraph 9 of legal paragraph II of the amended complaint, defen- [fol. 26] dant incorporates herein its answer to rhetorical paragraph 9 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

Wherefore, defendant prays judgment for its costs herein expended.

Third Defense.

For third and further defense to the amended complaint herein, defendant alleges:

1. That heretofore on the 8th day of December, 1958, the plaintiff herein brought an action in the United States District Court for the Northern District of Indiana, Hammond Division, Civil No. 2518, against the defendant named herein; that defendant was duly notified of the pendency

of said action by the service of summons and that thereafter defendant appeared to said cause of action and filed its answer to plaintiff's complaint therein.

2. That the issue presented in the complaint filed by plaintiff on December 8, 1958, known as Civil No. 2518, was identical to the issue presented in the instant complaint; namely, the arbitrability of a grievance filed by the plaintiff which questions the right of defendant to contract out certain work at its refinery in Whiting, Indiana.

3. That thereafter plaintiff and defendant stipulated the facts in the action known as Civil No. 2518 and a trial of said cause was had upon the facts as so stipulated in the United States District Court for the Northern District of Indiana, Hammond Division, and upon the issues so joined.

4. That after a full and complete hearing on the issues as established by the stipulation of facts, the United States District Court for the Northern District of Indiana, Ham- [fol. 27] mond Division, entered a judgment and decree on August 10, 1959, which said judgment was in favor of defendant and decreed that defendant was not required to arbitrate its right to contract out work at its refinery in Whiting, Indiana.

5. That thereafter plaintiff appealed the judgment and decree entered by the district court in favor of defendant to the Court of Appeals and on March 2, 1960, the United States Court of Appeals for the 7th Circuit affirmed the judgment of the district court.

6. Defendant further alleges that the issues as presented in plaintiff's complaint herein are the same issues presented in the plaintiff's complaint in said former action; that plaintiff herein was the plaintiff in said former action and that defendant herein, American Oil Company, is the successor corporation to defendant in said former suit; Standard Oil Company, and that there were no other or different parties in said former action.

7. That the said United States District Court for the Northern District of Indiana, Hammond Division, had

jurisdiction of the subject matter and of the parties; that by said complaint and answer, the merits of said cause of action were put in issue, and the judgment of the district court thereon was upon and covered all of the issues of said cause of action that were litigated and that might or could have been litigated under said issues so joined.

8. That by reason of the premises, the cause of action set out and sued upon in plaintiff's complaint herein has been, by said former proceedings in the United States District Court for the Northern District of Indiana, Hammond Division, as aforesaid, fully adjudicated; that plaintiff has been granted a full and complete opportunity to present its claim against this defendant in said former action.

[fol. 28] Wherefore, defendant prays judgment for its costs herein expended.

Daniel F. Kelly, Donald L. Hastings, D.F.K., Palmer Singleton Jr., D.F.K.; Attorneys for Defendant, American Oil Company, Inc.

Tinkham, Beckman, Kelly and Singleton; 708 Calumet Building, Hammond, Indiana. Telephone: Westmore 3-0482.

In the United States District Court

3090

Motion of the Defendant, American Oil Company, for Summary Judgment—Filed February 13, 1963

Comes now the defendant, American Oil Company, by Donald L. Hastings, Richard P. Tinkham, John F. Beckman, Jr., Daniel F. Kelly, and Palmer C. Singleton, Jr., its attorneys, and moves the Court to enter summary judgment in favor of the defendant, American Oil Company, and against the plaintiff, Independent Petroleum Workers of America, Inc., on plaintiff's amended complaint in two paragraphs, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure.

In support of said motion for summary judgment, defendant submits herewith the affidavit of A. F. Endres, which is attached hereto and made a part hereof.

Donald L. Hastings, Richard P. Tinkham, John F. Beckman, Daniel F. Kelly, Attorneys for defendant, American Oil Company.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF A. F. ENDRES IN SUPPORT OF MOTION OF THE DEFENDANT, AMERICAN OIL COMPANY, FOR SUMMARY JUDGMENT.

State of Indiana,
County of Lake, ss.:

A. F. Endres, being first duly sworn upon his oath, deposes and says: That he is the Plant Manager of the Whiting Refinery of American Oil Company, defendant in the above-entitled action; that the action is brought pursuant to the provisions of Section 301 of the Labor Management Relations Act and requests that the Court order defendant to arbitrate a certain grievance filed by the plaintiff, which said grievance questions the right of defendant to contract out certain crane work under the provisions of the working agreement in effect between the parties.

Affiant further states that defendant is a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and is an employer in an industry affecting commerce as defined in the Labor Management Relations Act of 1947, as amended; that said defendant maintains and operates a manufacturing plant in the Cities of Hammond, Whiting, and East Chicago, Indiana, for the manufacture of products from petroleum, which manufacturing plant is commonly known as the "Whiting Refinery"; that affiant has been employed at said Whiting Refinery for approximately forty years and has been the Plant Manager of said refinery since

October of 1952; that defendant employs approximately three thousand persons at said refinery and affiant has [fol. 30] participated in and had supervision over all negotiations, grievances and other labor-management problems arising between plaintiff and defendant since 1952.

Affiant believes that there is no genuine issue on any material fact regarding the contracting out of crane work referred to in the complaint as between the plaintiff and defendant, American Oil Company, and that defendant, American Oil Company, is entitled to judgment as a matter of law.

Affiant further states that the plaintiff is a not-for-profit corporation, organized under the laws of the State of Indiana, and is a labor organization representing employees in an industry affecting commerce as defined in the Labor Management Relations Act of 1947, as amended, and that plaintiff is the bargaining representative for the 3,000 unit employees employed at the Whiting Refinery of defendant.

That on or about August 27, 1959, the plaintiff and defendant entered into a collective bargaining agreement, a copy of which is attached to the original complaint filed by plaintiff, made a part thereof, and marked "Exhibit A," covering the employees of the defendant as described therein for the term from August 14, 1959 to August 14, 1960; that on August 10, 1960, the plaintiff and defendant entered into an agreement to extend the collective bargaining contract executed on August 27, 1959 indefinitely, subject to cancellation by either party upon the giving to the other of seventy-two hours' notice, and said extension continued to December 22, 1960.

That for many years, the defendant has caused the crane-operating work at its Whiting Refinery to be performed by its own employees and by independent contractors; that whenever defendant used independent contractors to perform crane operating work or other types of work in and about the Whiting Refinery, one or more of the following [fol. 31] factors were in existence and were considered by defendant in arriving at its decision to use independent contractors:

(a) Whether the defendant had employees qualified to perform the work to be done;

(b) Whether the defendant had employees qualified to perform the work to be done, but such employees were not available to perform such work by virtue of their assignments to other duties;

(c) Whether the performance of the work by defendant's own employees would require the employment of additional employees and a layoff of such additional employees after completion of the work, thus creating undesirable fluctuations in defendant's work force;

(d) Whether the work involved secret patented or unique processes or secret patented or unique materials which the defendant could not reasonably have its own employees perform or handle;

(e) Whether the defendant had the equipment available to perform the work, such equipment being reasonably necessary to the performance of such work;

(f) Whether the defendant was able to secure from the independent contractor a guarantee as to the quality of the work to be done;

(g) Whether estimates revealed that the work could be performed more economically by an independent contractor than by defendant's own employees;

(h) Whether the results of the performance of similar work by defendant's own employees was satisfactory or otherwise;

(i) Whether previous experience showed that defendant's own employees did not desire to do the work because of the disagreeable nature of the work or because of the hazards involved.

[fol. 32] That the defendant, where practicable, has endeavored to cause crane-operating work to be performed by its

own employees, rather than by independent contractors; but defendant has for many years contracted with various independent contractors for the performance of crane-operating work which was performed at defendant's Whiting Refinery by said independent contractors; that attached hereto and marked "Exhibit A" is a list of the crane-operating work performed by independent contractors at the Whiting Refinery of defendant during the years 1957 to 1960, both inclusive; that in addition thereto, the defendant has for many years contracted with various independent contractors for the performance of other work at its Whiting Refinery, including pipe fabrication, electrical repairs, pipe cleaning, brass foundry work, tool making, and others, which work was performed by said independent contractors.

That prior to the year 1952, several collective bargaining agreements between the parties required the compulsory submission to arbitration of substantially any dispute or disagreement between the parties; that the subject of incorporating some limitation or restriction on the scope of matters subject to arbitration was first discussed between the parties in the summer of 1952; that on or about July 30, 1952, plaintiff union issued its Bulletin No. 2, a copy of which is attached as "Exhibit B"; that shortly thereafter, the parties held discussions and negotiations on the subject of arbitration limitation, which negotiations culminated in the language which now constitutes Section 10 of Article 2 of Exhibit "A" to plaintiff's original complaint, and was incorperated into the collective bargaining agreement on August 30, 1952.

That from time to time since December, 1955, the plaintiff union has proposed the inclusion in the collective bargaining agreement, and the parties have discussed dur- [fol. 33] ing negotiations, a specific proposal restricting the right of the defendant to contract with independent contractors for the performance of work at its Whiting Refinery; that such proposals have been rejected by the defendant.

During the negotiations between the plaintiff union and the defendant in the month of December, 1955, with relation to the modification and revision of the collective bar-

gaining agreement, the union proposed a "contracting out of work" clause, which clause would have prevented defendant from contracting any work with independent contractors, provided the defendant had the equipment and qualified employees necessary to perform the work. This proposal was rejected by the defendant.

During negotiations between the plaintiff union and defendant with respect to modification and revision of the collective bargaining agreement, in the year 1957, the union proposed the following addition to the collective bargaining agreement:

> "That all employees having a craft date be up in their respective craft before the company could contract out work which could be performed by that craft."

This proposal, which was rejected by the defendant, was intended to preclude the use by the defendant of independent contractors for work involving any craft while defendant's own employees with seniority in such craft were performing lower-rated labor work, unless defendant's own employees with seniority in the particular craft were returned to their craft jobs and rates while the employees of the independent contractors were performing any work involving the same craft in defendant's plant.

During negotiations between the plaintiff union and the defendant, in the month of February, 1959, with respect to the terms and provisions of a new collective bargaining agreement to succeed the agreement effective March 8, [fol. 34] 1957, the plaintiff union prepared the following modification of the collective bargaining agreement:

> "That a clause be incorporated in the contract which would provide that the company would not contract out work normally performed by the production and maintenance employees at the Whiting Refinery."

That this was the first time that plaintiff had proposed this specific language for the restriction of the right of defendant to contract with independent contractors, and this proposal was rejected by the defendant.

During negotiations between the plaintiff union and the defendant, in the month of December, 1961, with respect to the terms and provisions of a new collective bargaining agreement, the union proposed an amendment to the collective bargaining agreement on the subject of contracting out work, which proposal was rejected by the defendant.

That on or about October 17, 1960, the defendant entered into a contract with Justak and Sons, an independent contractor, for the performance of certain crane-operating work involving the demolition of buildings and refinery facilities at the Whiting Refinery; that in connection therewith, the employees of Justak and Sons operated certain cranes owned by Justak and Sons, and rented to the defendant, and assisted in the demolition of buildings and refining facilities by doing the crane-operating work in connection therewith; that as a result the performance of such crane-operating work by the independent contractor, Justak and Sons, the plaintiff union filed a grievance, which grievance became and was known as Case No. Whiting 60-105, and which grievance is as follows:

> "The Board of Directors of the IPWA request that, as required by the recognition clause of the applicable agreement and established past practice, policy, cus-
> [fol. 35] tom and usage, employees of the crane department be assigned and perform all crane-operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost."

That this grievance was denied by the defendant.

That the plaintiff, on or about February 2, 1961, requested that the said grievance be referred to arbitration, and the defendant thereupon refused to submit such grievance to arbitration on the ground that the said grievance

was not arbitrable under the terms and provisions of the collective bargaining agreement.

Affiant further states that on or about December 8, 1958, the plaintiff herein brought an action in the United States District Court for the Northern District of Indiana, Hammond Division, Civil No. 2518, against the defendant named herein; that defendant appeared to said cause of action and filed its answer to plaintiff's complaint therein; that the issue presented in the complaint filed by plaintiff on December 8, 1958, known as Civil No. 2518, was substantially equivalent to the issue presented in the instant complaint; namely, the arbitrability of a grievance filed by the plaintiff which questioned the right of defendant to contract out certain work at its refinery in Whiting, Indiana.

That thereafter plaintiff and defendant stipulated the facts in the action known as Civil No. 2518 and a trial of said cause was had upon the facts as so stipulated in the United States District Court for the Northern District of Indiana, Hammond Division, and upon the issues so joined; that after a full and complete hearing on the issues as established by the stipulation of facts, the United [fol. 36] States District Court for the Northern District of Indiana, Hammond Division, entered a judgment and decree on August 10, 1959, which said judgment was in favor of defendant and decreed that defendant was not required to arbitrate its right to contract out work at its refinery in Whiting, Indiana.

That thereafter plaintiff appealed the judgment and decree entered by the district court, in favor of defendant to the Court of Appeals and on March 2, 1960, the United States Court of Appeals for the 7th Circuit affirmed the judgment of the district court on the ground that the defendant had not agreed to arbitrate its right to contract out work at the Whiting Refinery.

A. F. Endres.

Subscribed and Sworn to before me, a notary public, this 12th day of February, 1963.

(Seal) Allen W. Teagle, Notary Public.

My commission expires: May 26, 1965.

[fol. 37]

EXHIBIT A TO AFFIDAVIT OF A. F. ENDRES

List of Crane and Operator Jobs Contracted Out by American Oil Company During the Years 1957 to 1960 Inclusive.

8- 6-57	BL	63987	Two 15T crawlers—eff. 8-7-57 990-46-9471 op. until 12-9-57
8-19-57	BL	64462	One 20T crawler TX 4026
11-25-57	BL	68964	One 20-30T mobile S.O. 990-41-9589
			One 20T truck S.O. 990-41-9591
12-12-57	BL	69766	One 20T crawler 990-41-9589
12-16-57	BL	64462	One 25T crawler S.O. 990-41-9613
1- 6-58	BL	64462	One 25T Truck TX 4028
10- 3-58	BL	83210	25T crawler R-19 J & L
			(R-24) 10-24-60 added 8-4
11-10-58	BL	85079	One 8-10T crawler Berry Lake Refr. Pump Hse. cancelled 4-17-59
			One 25T to #11 Pipe Still
8-25-59	BL	99008	15T crawler R-5 No op.
			10-30-59 cancelled oper.
9- 9-59	BL	99789	25T crawler R-14 eff. 9-17-59 *No op.*
			10- 7-59 added 8-4
			10-30-59 dropped 8-4
			11-16-59 added 4-12
			12-18-59 cancelled op.
			2- 1-60 added 8-4, 4-12
			5 & 6 P. S.
			2- 5-60 cancelled 8-4, 4-12
9-12-59	BL	2167	Used at boat docks and then to Cal. Nitro.
9-15-59	BL	2167	Pull a tube bundle at Cal. Nitro.
9-18-59	BL	288	25T crawler R-15 eff. 9-21-59 FCU 500
			12-18-59 cancel O.O.
			2- 1-60 added 8-4
			2- 5-60 cancel 8-4
9-21-59	BL	2167	Hoist machinery to top of building—Research
9-23-59	BL	2167	Scale job at Cal. Nitro
9-23-59	BL	2167	For Cal. Nitro
11-17-59	BL	3145	To place propeller on ship at docks
12-13-59	BL	5255	To set #P-11-C electric motor at Cal. Nitro
12-29-59	BL	5178	25T crawler R-16 eff. 1-4-60 8-4, 4-12 Alkymer
			2-12-60 cancelled 8-4, 4-12

12-29-59	BL	5173	Crawler with 4 yd. shovel R-1	eff. 1-4-60 8-4 41-55 4-7-60 4-12 added 2-15-60 cancelled all
12-29-59	BL	5180	50T crawler R-17 dismantling	eff. 1-4-60 with O.O. 31-40 3-7-60 added 12-8 4-1-60 cancelled both shifts op. 8-4 10-24-60

[fol. 38]

12-29-59	BL	5179	40T crawler R-20	eff. 1-4-60 31-40 3-7-60 added 12-8 3-11-60 cancelled 1-8 12-8 4-21-60 cancelled 4-12 4-29-60 cancelled 8-4 5-9-60 added 8-4 5-13-60 cancelled 8-4 10-24-60 added 8-4
1-6-60	BL	5478	45T crawler R-18	eff. 1-11-60 8-4, 4-12 41-55 4-22-60 cancel 4-12 4-29-60 cancel 8-4 5-9-60 added 8-4 5-13-60 added 8-4 5-16-60 added 8-4 cancelled crane 8-31-60
1-13-60	BL	5834	J & L Tank Field	
1-15-60	BL	5988	Install sump pump and motor at Cal.-Nitro	
2-4-60	BL	7072	50T crawler R-21	eff. 2-8-60 8-4, 4-12 31-40 3-11-60 cancel 4-12 4-1-60 cancel 2 shifts 4-18-60 added 8-4, 4-12 4-22-60 cancel 8-4, 4-12 5-9-60 added 8-4, 4-12 5-13-60 cancel 4-12 10-24-60 add 8-4
2-11-60	BL	7390	Unload drums at Indiana Tank Field	
3-9-60	BL	8728	Crawler with 4 yd. shovel R-1	eff. 3-14-60 8-4 dism. stills 4-22-60 cancelled

3-23-60	Bl.	9553	40T crawler R-22	Eff. 3-28-60 — #7 P.S. 4-1-60 cancel 8-4 10-24-60 added 8-4
4-28-60	Bl.	12744	Unload propeller from Red Crown at docks	
5-31-60	Bl.	12744	Change of propeller on Cowan at docks	
6- 1-60	Bl.	12841	Replacing propeller on Seubert at docks	
6- 8-60	Bl.	13197	Move compressor parts for sandblasting at Cal. Nitro	
6-22-60	Bl.	13873	Set pump at Cal. Nitro	
6-23-60	Bl.	14004	Move 8-ton filter cartridge at Cal. Nitro	
7- 7-60	Bl.	14473	Remove equipment for engine room of Red Crown at docks	
8- 1-60	Bl.	15379	50T crawler 8-1	0.0.2 days to instruct 121-30
8-23-60	Bl.	16708	50T crawler R-23	10-24-60 added 8-4 Eff. 9-1-60 *No op.* 7th row
10-11-60	Bl.	18814	Load motor at Cal. Nitro	
10-14-60	Bl.	18998	Unload 2 vessels at south end of Cal. Nitro	
10-19-60	Bl.	19111	Change pump end—Zone 4A	

[fol. 39]

EXHIBIT B TO AFFIDAVIT OF A. F. ENDRES

Bulletin No. 2.

To All Members—Local 100 (Inc.)—Central States Petroleum Union Released by Union Board of Directors. Refers to Management's Letter, July 10, 1952.

Under date of July 10, 1952, each employee received a letter from Management which showed the interim agreement. This bulletin will enlighten you on Facts 2 and 3 of that letter.

Mr. Ducommon states that "slight changes" would be made. We ask that you carefully digest this language:

> (2) "The only questions which may be referred to arbitration shall be questions directly involving or arising from
>
> (b) Discharges of employees who have more than sixty (60) work periods to their credit, and
>
> (c) An interpretation of or an alleged violation of provisions of this interim agreement."

Now, study this language from the 1950 Contract.

> "Questions pertaining to applications, interpretations or alleged violations of the contract, previous agreements or previous arbitration awards, as well as questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment not covered by the contract shall be eligible for handling thru the procedure as set forth in Sect. 1-9."

In other words, any and everything can be arbitrated under our old contract, with the exception of a general wage increase, which remained until January 18, 1950, when Management removed the arbitration clause referring to the general wage increase, thereby instituting the "work-stoppage" clause. This issue also would have been settled by an arbitrator prior to January 18, 1950.

[fol. 40] Now the extension-agreement, which is ambiguous (meaning an agreement capable of being understood in more senses than one), can be interpreted so that it gives Management the prerogative and inherent powers to cancel and modify any previous agreements, previous arbitration awards that are not a violation or a misinterpretation as spelled out in the contract, such as:

> Purchase of coke, smoking agreements for employees, BS rate, Fire Marshal promotions, set up, ground glass goggles, bargaining on vacation dates, limitation of work for acid maintenance, craft, furnishing of tools to mechanics, choice of Sunday groups, etc.

Further, Management can put into effect any program they so desire, except that barred by the contract. What Recourse Does The Union Have Under The July 10, 1952 Letter? None! No arbitration and no right to strike as long as that interim-agreement is in effect. Someone may say that they can arbitrate alleged violation and interpretations of the extension-agreement. That is correct, and the above are considered "slight changes" by our Management. However, many matters of interest to employees are not a part of the contract and can be voided by an unfavorable management without any recourse by the Union.

If There Are Some Who Cling To The Idea That The Soco Would Not Hurt Their Employees, Just Open Your Eyes And Look Around At The Confusion Among The Crafts Where Work Is Being Wrongfully Assigned Daily, —with the comment,— "There Is No Contract, So Do As You Are Told!—Or, Go Home!! Where there is no contract to bar, they do as they please. Would they, then, do as they please if we had a contract that did not bar?

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF JOSEPH J. SOTAK IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO LEGAL PARAGRAPH II—Filed February 27, 1963

State of Indiana,
County of Lake, ss.:

Joseph J. Sotak, being first duly sworn on oath, deposes and says:

1. That he is an employee of the defendant company at its Whiting, Indiana, refinery, and has been such for a period in excess of twenty-four (24) years; and that his present job classification is that of an instrument mechanic, in the Instrument Department, and that he was so employed on or about the 12th day of September 1960;

2. That he is the duly elected, qualified and acting representative of the Tenth Division of the plaintiff labor organization, and is the duly elected, qualified and acting secretary-treasurer of the plaintiff labor organization, and that he has occupied the position first mentioned for a period in excess of ten (10) years;

3. That as said union representative and as said union officer he is now and was, on or about the 12th day of September 1960, familiar with the assignment of employees of the defendant to the performance of crane operating work, particularly because the employees working in and

assigned to the Crane Department are in said union division;

4. That from time to time prior to the 12th day of September 1960 crane operating work was performed at the said refinery, and had been so performed continuously for a period in excess of ten (10) years prior to said date, [fol. 42] and that, on all occasions when such work was performed, it was assigned to employees of the Crane Department, provided that such employees were qualified to perform such work;

5. That any failure of the defendant to assign such crane operating work to a qualified employee, and its employment of an independent contractor to perform such work while a qualified employee was available, would or might cause the qualified crane operator to be required to perform other work, of a different nature and at a lower rate of pay, and that the said qualified crane operator might or would be required to perform his duties under working conditions substantially different from those which would have been applicable had such independent contractor not been hired;

6. That this affidavit is made for the purpose of correctly setting forth the facts with reference to the differences in working conditions which might or could obtain, for a qualified crane operator, if crane operating work were assigned to an independent contractor;

7. That this affiant is sufficiently informed as to the matters stated herein to make this affidavit.

Joseph J. Soták.

Subscribed and sworn to before me this 26th day of February 1963.

William Belshaw, Notary Public.

(Seal)

My Commission Expires: May 13, 1965.

[fol. 43]

IN THE UNITED STATES DISTRICT COURT

3090

ORDER ON MOTIONS FOR SUMMARY JUDGMENT—March 13, 1963

The Motion of the plaintiff for Summary Judgment as to Paragraph I of the amended complaint is Granted.

Defendant's motion for Summary Judgment as to Paragraph I of the amended complaint is Denied.

Defendant's Motion for Summary Judgment as to Paragraph II of the amended complaint is Denied.

Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed.

George N. Beamer, Judge.

Enter: March 13, 1963.

MEMORANDUM ATTACHED TO ORDER

The plaintiff brought this action to compel arbitration pursuant to Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C. § 185).

In Paragraph I of its amended complaint, plaintiff alleges that defendant refused to arbitrate grievances growing out of alleged violations of the collective bargaining agreement. The alleged violations consisted of contracting out crane operating work which plaintiff contends should have been performed by employees of the crane operating department. The plaintiff asserts that contracting out work violated Article I of the collective bargaining agreement and the established practices, policies, customs and usages relative to working conditions.

Defendants admit that plaintiff filed the grievance in accordance with procedure outlined in the collective bar- [fol. 44] gaining agreement; that negotiations did not result in settlement of the dispute; and that defendant refused plaintiff's request to arbitrate on ground that the dispute did not fall within the arbitration clause of the contract.

Thereafter, both parties filed a Motion for Summary Judgment with supporting affidavits as to Paragraph I of the amended complaint. Defendant also filed a Motion for Summary Judgment addressed to Paragraph II of the amended complaint, which the plaintiff opposes.

Paragraph I of the complaint involves the alleged violation of Article I of the collective bargaining agreement. Paragraph II involves the alleged violation of established policies, practices, customs and usages relative to working conditions.

The parties agree that there is no genuine issue as to any material fact insofar as the allegations of Paragraph I of the amended complaint are concerned.

Plaintiff contends that its Motion for Summary Judgment must be sustained by virtue of the teachings of *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Defendant contends that (1) the arbitration clause in the contract is limited and does not (1) embrace the dispute covered by plaintiff's grievance; (2) that this matter has been settled by the Court of Appeals for the Seventh Circuit in the case of *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960), which case inquires into the same contract between the same parties, and virtually the same set of facts as are involved in this dispute; and (3) that the claim of the plaintiff is frivolous in that the alleged acts could not possibly be in violation of Section 1 of the collective bargaining agreement which is the recognition clause of the contract.

[fol. 45] The arbitration clause of the collective bargaining agreement, Article II, Section 10, page 5, reads as follows:

A. Questions which may be referred to arbitration shall be limited to:

1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, interpretations or alleged violations

of the terms of arbitration awards and written agreements not incorporated in this Agreement.

3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:

(a) the modification by the Company of any of said policies, practices, customs and usages, or

(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

Defendant contends that the arbitration clause is limited in scope and does not involve contracting out work disputes contained in the plaintiff's grievance. In the light of the Supreme Court's decision in *United Steelworkers of America* v. *Warrior Navigation Co., supra*, 363 U. S. 574, I cannot agree with defendant's contentions. That case also involved a contracting out work dispute. The contract there had a broad arbitration clause but it also contained a provision which said that "matters which are strictly a [fol. 46] function of management shall not be subject to arbitration." Id. at 577. The Court of Appeals held that contracting out work was strictly a matter of management and therefore not subject to arbitration, *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 269 F. 2d 633 (1959). The Supreme Court reversed and in discussing the duty of the Court to order arbitration said:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

> "We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure, the agreement provides that 'matters which are strictly a function of management shall not be subject to arbitration.' But it goes on to say that if 'differences' arise or if 'any local trouble of any kind' arises, the grievance procedure shall be applicable."

In the instant case, Section 10.X(1) of the arbitration clause provides that arbitration may be had as to questions directly involved in or arising out of the applications, interpretations or alleged violations of the terms of the collective bargaining agreement. Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of "alleged violations of the terms of this agreement." Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration. No matter how strongly the Court may feel as to the lack of merit in the plaintiff's claim, it cannot deny arbitration if the arbitration clause is applicable, for by so doing, it would be passing on the merits of plaintiff's complaint, which is prohibited. Id.

[fol. 47] The case of *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960), which the defendant relies on as being dispositive of this question, would be persuasive except for the fact that that case, which also involved the contracting out of work, was decided on Section 10A(3) of the arbitration clause which deals with policies, practices, customs or usages relative to working conditions. The Court held that the grievance there did not involve working conditions. Moreover, that case was decided prior to the decision of the Supreme Court in *Warrior*. In its holding, the Court of Appeals relied very heavily upon the case of *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 269 F. 2d 633 (1959), the decision of the Fifth Circuit which the Supreme Court subsequently reversed. Had *Warrior* been decided by the Supreme Court prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT

3090

JUDGMENT AND DECREE—March 13, 1963

This cause coming on to be heard on the respective Motions for Summary Judgment filed by the plaintiff and defendant and the Court having heard the argument of counsel and being fully advised in the premises, the Court having rendered an order and memorandum of decision, it is therefore

Ordered Adjudged and Decreed that there is no genuine issue as to any material fact herein and the prayer of the plaintiff's complaint is hereby granted; the defendant, American Oil Company, a Maryland corporation, is hereby ordered to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties attached to the complaint as Exhibit A, and judgment decree for costs is hereby rendered against the defendant.

George N. Beamer, Judge.

Enter: March 13, 1963.

[fol. 49]

IN THE UNITED STATES DISTRICT COURT

No. 3090—Civil

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

vs.

AMERICAN OIL COMPANY.

NOTICE OF APPEAL—Filed April 9, 1963

Notice Is Hereby Given that American Oil Company, defendant above named, hereby appeals to the United

States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 13, 1963.

Dated at Hammond, Indiana, this 9th day of April, 1963.

Richard P. Tinkham, One of the Attorneys for the Defendant, American Oil Company, 708 Calumet Building, Hammond, Indiana.

To the Clerk:

Please serve this Notice on William Belshaw, Esq., 1450—119th Street, Whiting, Indiana, One of the Attorneys for the Plaintiff.

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT

No. 14183

September Term and Session, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., Plaintiff-Appellee,

-v.-

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Before Knoch, Castel and Major, Circuit Judges.

OPINION—November 21, 1963

MAJOR, Circuit Judge. Plaintiff, Independent Petroleum Workers of America, Inc. (Union), brought this action under and by virtue of Section 301 of the Labor-Management Relations Act of 1947 (29 U. S. C. A. Sec. 185), to require defendant, American Oil Company (Amer[illegible]), to submit to arbitration a grievance that American had breached the collective bargaining agreement in effect between the parties

by contracting out crane work to an independent contractor. Both sides move for summary judgment. American's motion was denied and the Union's granted. On March 13, 1963, the Court entered judgment against American and ordered it "to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties." From this judgment American appeals.

The collective bargaining agreement insofar as here material consists of Article I, Recognition, and Article II, Grievance Procedure. The former is the common clause by which "the Company recognizes the Union as the sole and [fol. 51] exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company * * *." The latter provides a step-by-step procedure for the resolution of grievances. This procedure culminates in compulsory arbitration in certain areas (as stated in plaintiff's brief) and is contained in Section 9 of Article II.

Subsection A, Section 10, Paragraph 1 of the same Article provides:

> "As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement."

This Paragraph is of a two-fold nature and plaintiff emphasizes in its brief that the instant case is predicated upon and involves only "alleged violations of the terms of this agreement." It states, "The parties agreed to refer to arbitration 'questions * * * arising from * * * alleged violations of the terms of this agreement.' It is under this

clause, and solely under this clause, that Legal Paragraph I of the plaintiff's amended complaint was brought."[1]

Subsection A, Section 10, Paragraph 3 provides for arbitration of "Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from [describing situations in which the Paragraph is to be given application.]". We mention Paragraph 3 at this point only because plaintiff heretofore sought under it to compel arbitration of the same grievance. *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706.

Subsection D, Section 10, imposes a further limitation on arbitration:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of [fol. 52] employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

Plaintiff on brief states the contested issue:

> "Is the defendant required to submit to arbitration the violation of the collective bargaining agreement alleged by plaintiff?"

Defendant on brief states this issue in different phraseology but in substance the same:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?"

[1] The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought.

Defendant states a second contested issue:

> "Does the prior adjudication of this Court of the same issue between the same parties require the denial of plaintiff's Motion for Summary Judgment and the granting of defendant's Motion for Summary Judgment?"

Much is stated in the briefs of both parties, particularly that of plaintiff, concerning three Supreme Court cases, all decided June 20, 1960, sometimes referred to as the "Steelworkers Trilogy." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593. We have read these cases many times and doubt if an attempt at detailed analysis would be of any benefit. The Court in *American*, as well as in *Warrior*, had before it an arbitration clause "as to the meaning, interpretation and application of the provisions of this agreement." Plaintiff here, as noted, expressly disclaims reliance upon such a basis but predicates its grievance upon a question directly involving an "alleged violation of the terms of this agreement." In any event, the so-called trilogy cases have not changed the long-established principle of law that compulsory arbitra- [fol. 53] tion cannot be properly awarded absent a contract between the parties agreeing thereto. Plaintiff appears to so recognize. Referring to the trilogy cases, in its brief it states that they "have now likewise left little doubt as to the duty of a court in its approach to the problem of arbitration in an industrial dispute situation."

Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its statement of the contested issue, as well as at other places in its brief. At one point it states, "There is only the issue of the agreement—or, non-agreement—of the parties to arbitrate." At another point it asks, "Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?"

As noted, plaintiff's claim for relief is based entirely upon the "alleged violations of the terms of this agreement." The question immediately arises—what terms? We find no answer in plaintiff's brief. However, in its complaint it alleged that defendant "violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby." This alleged violation refers to the recognition clause which provides, "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment." Certainly both defendant and plaintiff, having entered into the contract, were obligated to bargain in good faith, an obligation imposed by the National Labor Relations Act, 29 U. S. C. A. Sec. 158.

The recognition clause makes no reference either to arbitration or to the contracting out of work. More than that, the complaint, referring to Article II, alleged, "The plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to defendant for submission of the alleged violation to arbitration," and that the defendant refused to submit the said grievance to arbitration. The grievance procedure specifically provides for bargaining between the parties concerning any grievance in dispute. Section 9 of such procedure commences, "If the question [fol. 54] is not settled as a result of negotiations[2] between the manager, or those designated by him, and the Union * * *." Then follow the provisions pertaining to arbitration which only when complied with make the question "eligible for referral to arbitration for settlement." Thus, the grievance procedure, including those provisions for bargaining on the question in dispute, must be followed step by step as a prerequisite to the right of either party to require arbitration. Plaintiff's allegation that the grievance procedure was followed is a clear admission that the parties had bargained without success concerning the issue in dispute.

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[2] The words "negotiations" and "bargaining" are used interchangeably in outlining the grievance procedure.

Plaintiff in its brief states, "This provision [referring to Section 10, Subsection A, Paragraph 1] of the grievance procedure simply states that a grievance matter which comes into existence because of the allegation of either party that the agreement has been violated is such a question as the parties have contractually bound themselves to arbitrate." In other words, it is plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration. This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.

Plaintiff's position is devoid of all logic. It is without merit and we so hold. Particularly is this so under the facts of the case where the complaint clearly demonstrates that the parties did bargain on the grievance in dispute.

There are other facets of the case which fortify the conclusion just stated. Subsection D of Section 10 (heretofore quoted) is a further limitation upon the arbitration provision of Section 9. Subsection D provides that the Company will bargain with the Union regarding matters not covered in the collective bargaining agreement but either party may refuse to arbitrate any such matter. Defendant contends the provision excludes from arbitration the contracting out of work because it is not covered in the agreement. Plaintiff makes no response to this contention. While we think there is plausibility in defendant's contention, we need not resolve it. The section is significant because the parties agreed that certain disputes were not subject to compulsory arbitration, which destroys [fol. 55] plaintiff's theory that the mere allegation of contract violation requires arbitration.

The bargaining history between plaintiff and defendant relative to the right of the latter to contract out work is much discussed in the briefs. Plaintiff urges that such history is irrelevant. We think, however, it has some significance and may properly be considered. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (concurring opinion, page 569). *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F. 2d 244, 247. This bargaining history is set forth

in our previous decision. 275 F. 2d 706, 708. In brief, it shows that plaintiff for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting the right of the defendant to contract out work. On each occasion the proposal was rejected. This bargaining history, while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit.

This brings us to the issue as to whether plaintiff is barred from pursuing the instant action by reason of the prior decision of this Court. 275 F. 2d 706. Defendant contends that it is, under both the doctrines of stare decisis and collateral estoppel. Plaintiff devotes most of its argument to the former and asserts, "If the defendant fails with stare decisis, it fails equally with 'prior adjudication.'" We think this is an erroneous statement but find it unnecessary to distinguish the two doctrines because we reach the conclusion that plaintiff is barred by collateral estoppel.

Plaintiff's sole argument in opposing the application of this doctrine is that "the cause of action is different," which presents the nub of the matter. In considering this issue, we have carefully examined the briefs, pleadings and opinion of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case. The two cases involve the same parties, with the same attorneys. The collective bargaining agreement in each case, including the provision for arbitration with the limitations thereon, is the same. The contested issue in both cases, as stated in plaintiff's briefs, was whether the de- [fol. 56] fendant agreed to arbitrate its right to contract out work. Plaintiff's prayer for relief in the former case was:

> "Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the sub-

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The contract in suit was entered into with Standard Oil Company, the named defendant in the prior suit; American, the named defendant in the instant suit, is the successor to Standard.

> mission of the involved issues to arbitration, as required by said subject agreement * * *."

Its prayer for relief in the instant case is exactly the same. It is true, as plaintiff points out and as the opinion of this Court discloses, plaintiff in the former case relied upon Paragraph 3, Subsection A, Section 10, in support of its contention that defendant was required by the terms of the agreement to arbitrate the question in dispute, while in the instant case it relies upon Paragraph 1 of the same section and subsection. The point is, however, that plaintiff might have relied upon Paragraph 1 in the previous suit but failed to do so. Its failure in this respect was not explained in its brief; neither was it explained by plaintiff's counsel during oral argument when given an opportunity to do so.

We think the conclusion inescapable that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only difference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case.

The cases which have dealt with the issue generally refer to and cite *Cromwell* v. *County of Sac*, 94 U. S. 351. In that case the Court discusses the difference between the effect of a judgment as a bar or estoppel to the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. The Court stated (page 352):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.*" (Italics supplied.)

[fol. 57] In *Grubb* v. *Public Utilities Commission of Ohio et al.*, 281 U. S. 470, 478, the Court stated:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that."

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597, the Court stated:

> "The rule provides that, when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."

There are many other cases to the same effect. See *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623; *United States* v. *International Building Co.*, 345 U. S. 502, 504; *Lynch* v. *Commissioner of Internal Revenue*, 216 F. 2d 574, 579, and *First National Bank in Wichita* v. *Luther*, 217 F. 2d 262, 265. Sometimes the doctrine is referred to as res judicata, as it was in *Luther*, wherein the Court stated:

> "It is the general rule that where a second suit between the same parties, or their privies, is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated, and as to every issue, claim, or defense which might have been presented * * *."

Plaintiff, so far as we are aware, did not petition the Supreme Court for certiorari in the case previously before this Court. In this connection, a statement in *Brownell v. Chase National Bank*, 352 U. S. 36, appears pertinent. The Court stated (page 39):

> [fol. 58] "Under familiar principles of res judicata, the claim so tendered may not be relitigated. *Cromwell v. County of Sac*, 94 U. S. 351, 352; *Tait v. Western Maryland R. Co.*, 289 U. S. 620, 623. If he was not content with the first ruling, his remedy was by certiorari to this Court. *Angel v. Bullington*, 330 U. S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issues tendered in the first suit."

Absent the application of the doctrine of collateral estoppel, we have before us a situation in which plaintiff relied yesterday upon one provision of the collective bargaining agreement in support of its claim or demand that defendant be required to submit to compulsory arbitration; today it relies upon a different provision of the same agreement in support of the same claim or demand, and tomorrow it will be at liberty to rely upon still another provision of the same agreement in support of the same claim or demand. It is our judgment that the doctrine should be applied and given effect.

Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration; and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action.

The judgment is reversed and the cause remanded, with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed.

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: HON. WIN G. KNOCH, Circuit Judge, HON. LATHAM CASTLE, Circuit Judge, HON. J. EARL MAJOR, Circuit Judge.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., Plaintiff-Appellee,

No. 14183 vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—November 21, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby Remanded to the said District Court with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day.

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: HON. WIN G. KNOCH, Circuit Judge, HON. LATHAM CASTLE, Circuit Judge, HON. J. EARL MAJOR, Circuit Judge.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

No. 14183 vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

ORDER DENYING PETITION FOR REHEARING—
January 6, 1964

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES
No. 971—October Term, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

vs.

AMERICAN OIL COMPANY.

ORDER ALLOWING CERTIORARI—May 18, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.